QA 27606

FHWA-97-2759-8

IN THE COUNTY COURT, IN AND FOR PALM BEACH COUNTY, FLORIDA.

CRIMINAL DIVISION

CASE NO. 97-28637 TC A02
97-28638 TC A02
97-28639 TC A02
97-28640 TC A02

STATE OF FLORIDA,

vs.

VICTOR MORALES,

Defendant.
_____/

DEFENDANT'S MOTION TO DECLARE SECTION 316.302, FLORIDA STATUTE, UNCONSTITUTIONAL

Defendant, Victor Morales, through counsel, hereby moves this Court to declare Section 316.302, Florida Statute, unconstitutional on its face and as applied to Defendant, and pursuant to Fla.R.Crim.P. 3.190(b), to dismiss his case. As grounds, he states:

FACTS

1. On or about August 26, 1997, Defendant was cited by a Palm Beach County Sheriff's Deputy, via a standard traffic citation, for a violation of Section 316.302(1), Florida Statutes (the "Statute"), which criminalizes 49 C.F.R. § 391.11(B)(2) -- the failure to "read and speak the English language sufficiently to converse with the general public."

2. Apparently the Statute applies to persons using commercial drivers licenses ("CDL").

3. At the time, Defendant was operating a vehicle with a CDL.

4. Defendant obtained his CDL by taking a driving test, administered by the State of

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Florida, Department of Motor Vehicles, in Spanish.

5. Section 316.302(10), Florida Statutes, authorizes any traffic enforcement officer to issue a traffic citation for a violation of 49 C.F.R. § 391.11(B)(2).[1]

6. 49 C.F.R. § 391.11(B)(2) states: "Can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records." *See Exhibit A.*

MEMORANDUM OF LAW

Criminal ordinances and statutes are to be *strictly construed* against the State and in favor of defendants. *Chicone v. State*, 684 So.2d 736, 741 (Fla. 1996). This is especially true where there is any doubt about the vagueness of a statute. *Brown v. State*, 629 So.2d 841 (Fla. 1994); *State v. Wershaw*, 343 So.2d 605 (Fla. 1977). Recognizing this judicial doctrine, this Court should immediately declare the Statute void because it is vague and overbroad, and because it violates Defendant's right to engage in expressive conduct under the federal and Florida constitutions. As shown below, the Statute (as written) is VAGUE because it does not give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden. It is also VAGUE (as applied to Defendant) because law enforcement officers are encouraged to make arbitrary and erratic arrests. The Statute is OVERBROAD because it criminalizes legal as well as illegal activity and accordingly chills First Amendment freedoms. Finally, the Statute simply infringes upon basic

[1] This Court should take judicial notice that a violation of any offense listed in Chapter 316 is a non-criminal traffic citation. *See* Section 318.14(1), Florida Statutes. Moreover, other persons in this County, charged with the Statute, have had their cases assigned to traffic court. *See Exhibit B.*

CONSTITUTIONAL FREEDOMS OF SPEECH AND ASSOCIATION, such as one's desire to speak and read a foreign language -- a right even recognized by the State of Florida in adopting policies to administer driving tests in Spanish.[2]

I. Vagueness

A. Fair Notice

In *Warren v. State,* 572 So.2d 1376, 1377 (Fla. 1991), the Florida Supreme Court defined the test for vagueness:

> A statute which does not give people of ordinary intelligence fair notice of what constitutes forbidden conduct is vague. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *State v. Winters*, 346 So.2d 991 (Fla.1977); *Franklin v. State,* 257 So.2d 21 (Fla.1971). The language of a statute must 'provide a definite warning of what conduct' is required or prohibited, 'measured by common understanding and practice.' *State v. Bussey*, 463 So.2d 1141, 1144 (Fla.1985).

In this case, a person violates the Statute if he or she cannot *"read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records."* 49 C.F.R. § 391.11(B)(2). How is a person of average intelligence to know what constitutes a reading and speaking English "sufficiently?" What are "official inquiries?" Why would someone need to under signs and signals in "English?" The riddles inherent in the language of the Statute indicate that it does not, as a matter of law, sufficiently apprise persons of what conduct is

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[2] As shown below, the Federal Highway Administration issued its "Advance Notice of Proposed Rulemaking," dated August 26, 1997, which states that it is considering a revision to the requirement that commercial truck drivers be required to "read and speak the English language sufficiently to converse with the general public . . . " *See Exhibit C.* Many of the concerns raised in the Advance Notice are echoed in this Motion.

prohibited.

As the Florida Supreme Court stated in *State v. Winters*, 364 So.2d 991, 993 (Fla. 1977):

> But without some statutory standards or guidelines, the Legislature has effectively set a net large enough to catch all possible offenders and has left to the courts the power to say who should be detained and who should be detained and who should be set at large. ***Such a statute is dangerous and does not provide due process.***

There is a plethora of other decisions also declaring similar ordinances void for vagueness. *Wyche v. State*, 619 So.2d 231 (Fla. 1993) (prostitution ordinance unconstitutionally vague); *Warren v. State*, 572 So.2d 1376 (Fla. 1991) (house of ill fame statute unconstitutionally vague); *Sloan v. State*, 371 So.2d 86 (Fla. 1979) (obscene comment-over-telephone statute void); *Franklin v. State*, 257 So.2d 21 (Fla. 1971) ("crime against nature" statute void for vagueness); *KLJ v. State*, 581 So.2d 920 (Fla. 1st DCA 1991) (curfew ordinance unconstitutional); B.H. v. State, 645 So.2d 987 (Fla. 1994) (juvenile escape statute vague); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 86 S.Ct. 211 (1965) (city penal ordinance which is so broad and undefined that it may be construed to say that a person can stand on a public sidewalk in the city only at the whim of any police officer of the city is unconstitutional); *Duke v. Smith*, 13 F.3d 388, 395 (11th Cir. 1994) (where there are no standards governing the exercise of the discretion granted by a law, law encourages arbitrary and discriminatory enforcement; reconsideration provision of Florida presidential preference ballot vague), *citing Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S.Ct. 839, 847 (1972); *Reeves v. McConn*, 631 F.2d 377, 383 (5th Cir. 1980) (ordinance prohibiting sound amplification vague and overly broad especially because "men of common intelligence must necessarily guess at its meaning and differ as to its application."); *Aladdin's Castle Inc. v. City of Mesquite*, 630 F.2d 1029 (5th Cir.

1980) (ordinance forbidding business "connection with criminal elements" was void for vagueness where citizen was forced to attempt to conform conduct to vague standard); *Barker v. State Com'n On Ethics*, 654 So.2d 646 (Fla. 3d DCA 1995) (when there is doubt about statute in vagueness challenge, such doubt is resolved in favor of citizen and against State; regulation forbidding receipt of gifts by public employees void for vagueness); *Brown v. State*, 629 So.2d 841 (Fla. 1994) (statute enhancing penalty for drug activity within 200 feet of public housing facility unconstitutionally vague because it does not give adequate notice of what conduct is prohibited); *Ciccarelli v. City of Key West*, 321 So.2d 472 (Fla. 3d DCA 1975) (loitering statute void for vagueness because it broadly describes prohibited conduct).

The primary problem with the language of the Statute is that it does not define "sufficient." For example, in *Allen v. City of Bordentown*, 524 A.2d 478 (N.J.Sup.Ct. 1987), a New Jersey court interpreted an ordinance which required a finding of "legitimate" purpose or business. That court found the term "legitimate business" did not provide sufficient guidance to parties as to what conduct was prohibited:

> The word 'legitimate' is not defined. Does it mean business permitted by law? Is business **'legitimate'** because the minor so believes? Who is to say what is **'legitimate** business'? Again his **definition** will be supplied on a subjective basis permitting the discriminatory enforcement of the ordinance.

Allen, supra at 482. The New Jersey court found the Bordentown ordinance to be both vague and overbroad. In this case, a law enforcement officer is given the unfettered discretion to determine whether a person passes the "sufficiency" test. *See K.L.J. v. State*, 581 So.2d 920, 921 (Fla. 1st DCA 1991) (term "legitimate business" in curfew ordinance is unconstitutionally vague).

B. Arbitrary Enforcement

In this case, the Statute gives unfettered discretion to law enforcement officers. *Papachristou*, 405 U.S. at 168-69. Indeed, a "vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). A law that lends itself to arbitrary enforcement can be void for vagueness ***even*** if it gives fair notice of what conduct it prohibits:

> Although the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recently recognized that the more important aspect of the vagueness doctrine *"is not actual notice, but the other principal element of the doctrine -- the requirement that the a legislature establish minimal guidelines to govern law enforcement"*. [citation omitted] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S.Ct. 1855 (1983) (emphasis added), cited by *City of Pompano Beach v. Capalbo*, 455 So.2d 468 (Fla. 4th DCA 1984), rev. denied, 461 So.2d 113 (Fla.). cert. denied, 474 U.S. 824 (1985) (declaring unconstitutional an ordinance that prohibited persons from sleeping in vehicles on streets). The *Kolender* Court ultimately found unconstitutionally vague a California statute that failed to make clear what would constitute "credible and reliable" identification of persons stopped for loitering on the streets. The Court found that such a defect left the decision of whether to arrest to "the whim of any police officer" and the decision rested on its "concern for arbitrary law enforcement and not on the concern for lack of actual notice." *Kolender*, 461 U.S. at 358.

The Fourth District in *Capalbo, supra.*, held that the "sleeping in the car ordinance" was void for vagueness not because of a fair notice defect, but because the ordinance:

> leaves in the unbridled discretion of the police officer whether or not to arrest one asleep in a motor vehicle on public street . . . a wide range of persons may violate the . . . statute[sic], from the tired child asleep in his car-seat while a parent drives or while parked in the car, to the alternate long distance driver asleep in the bunk of a moving or parked tractor trailer, to the tired or inebriated driver who has taken widely disseminated good counsel and chosen to go to sleep in his parked car rather than take his life or others' lives in his hands, to the latterday Okie who has made his jalopy his hime. ***The officer encountering theses varied situations is left free to decide for himself whether to enforce the ordinance.***

Capalbo, 455 So.2d at 470 (emphasis added).

In this case, a law enforcement officer is left free to decide whether a driver passes the "sufficiency" test, without any reliable "test" or other measure to determine if the person's knowledge of the English language is "sufficient." Certainly this Court can envision many situations where an officer may, at his or her whim, arrest a person under the Statute -- without even a clue as to whether a person can really "sufficiently" speak English. Such personal predilections of law enforcement officers should not be allowed in a free society, especially when (as shown below) the uncertainty induced by a law threatens to inhibit the exercise of constitutionally protected rights. *Grayned*, 408 U.S. at 109, cited by *Capalbo*, 455 So.2d at 470. Basically the Statute is vague because ***anyone*** can be arrested under it, for ***any reason!***

II. Overbreadth

A statute is overbroad when it criminalizes legal as well as illegal activity and has a chilling

effect on first amendment freedoms. *See, e.g., Clark v. State*, 395 So.2d 525 (Fla. 1981); *State v. Keaton*, 371 So.2d 86 (Fla. 1979). Effective law enforcement does not require that citizens be at the "mercy of the officers' whim or caprice," *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311 (1949), and the just "concerns of the public regarding crime must take rational expression and not become a mindless fear that erodes the rights of a free people." *Capalbo*, 455 So.2d at 470. Thus, a "penal statute that brings within its sweep conduct that cannot conceivably be criminal in purpose or effect cannot stand." *Id.*

When lawmakers attempt to restrict or burden fundamental and basic rights such as those First Amendment rights possessed by Defendant in this case, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible. *See Firestone v. News-Press Publishing Co.*, 538 So.2d 457 (Fla.1989). As the United States Supreme Court has noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. A328, 9 L.Ed.2d 405 (1963). Put another way, statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct. *News-Press Publishing Co.*, 538 So.2d at 459. When legislation, as in this case, is drafted so that it may be applied to conduct that is protected by the First Amendment, it is said to be unconstitutionally overbroad. *See Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources*, 453 So.2d 1351, 1353 (Fla. 1984).

In *Ledford v. State*, 652 So.2d 1255 (Fla. 2d DCA 1995), the Second District held that a city ordinance prohibiting begging for money while about or upon a public way was unconstitutionally overbroad. The court specifically recognized that begging is ***communication*** that is entitled to some degree of First Amendment protection, and because the restriction is applied in a traditional public

forum, the regulation could survive only if: 1) it was narrowly drawn to achieve a compelling governmental interest, 2) the regulation was reasonable, and 3) it was viewpoint neutral. *Ledford, supra.* at 1256.[3] The court also recognized that ordinance did not distinguish between "aggressive" and "passive begging." *Id.*

In this case, the Statute is drafted in a manner so that it can be applied to ***any*** conduct where it is believed that a person cannot sufficient speak or read English. However, speaking is "communication" protected by the First Amendment, even if it is a communication in another language. Indeed, even the State of Florida has recognized under certain circumstances that State-sponsored activities and/or programs should be advertised in Spanish. Moreover, the State of Florida publishes the traffic laws and "rules of the road" in Spanish. *See Exhibit D* (excerpts of manual).

Because the Statute applies to constitutionally-protected speech and conduct, the First Amendment is naturally implicated. The State, however, cannot show that the Statute is narrowly drawn to achieve some compelling state interest. While the State may claim that it has a compelling interest to rid its streets of non-Engligh speaking drivers, the Statutes still must be declared overbroad because it is not narrowly tailored to meet the State's compelling interest.[4]

III. Expressive Conduct Protected by the First Amendment

"The First and Fourteenth Amendments ... take away from the government, state and federal, all power to restrict freedom of speech, press, and assembly where people have a right to be for such purposes." *Cox v. Louisiana*, 379 U.S. 536, 578, 85 S.Ct. 453, 468, 13 L.Ed.2d 471 (1965)

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[3] *See also Perry Education Association*, 460 U.S. at 45, 103 S.Ct. at 955.

[4]It should be duly noted that nowhere in the legislative history of the Statute (which was revised in 1996) is there an expressed intent. *See Ledford, supra* at 1257.

(separate opinion of Justice Black) (emphasis in original). In *W.J.W. v. State*, 356 So.2d 48 (Fla. 1st DCA 1978), the First District court struck down a city of Pensacola curfew ordinance because it infringed on basic constitutional rights:

> Restraining children under the age of sixteen years from freely walking upon the streets or other public places when *no emergency exists is incompatible with the freedoms of speech, association, peaceful assembly* and religion secured to all citizens of Florida by Article I of the Florida Constitution.

Id. at 50 (emphasis added). Other courts have recognized the implication of basic constitutional rights in such mundane activities as begging, *Loper v. City of New York City Police Department*, 999 F.2d 699, 704 (2d Cir. 1993) (as between canvassers and beggars, "the former are communicating the needs of others while the latter are communicating their personal needs; both solicit charity of others, thus, the distinction is not a significant one for First Amendment purposes."), overnight camping, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-94, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984) (assuming that overnight camping in a public park in connection with a demonstration in support of the homeless was expressive conduct protected by the First Amendment), nude dancing , *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981) (nude dancing is constitutionally protected expression), wearing arm bands in high school, *Tinker v. Des Moines School District*, 393 U.S. 503, 505-06, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969) (wearing black armbands in school is akin to pure speech), sit-ins, *Brown v. Louisiana*, 383 U.S. 131, 141-42, 86 S.Ct. 719, 723-24, 15 L.Ed.2d 637 (1966) (sit-in by blacks in a "whites only" area to protest segregation was expression protected by First Amendment); flag salutes, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33, 63 S.Ct. 1178, 1182, 87 L.Ed. 1628 (1943) (compulsory flag salute is a form of utterance within the protection of the First

Amendment); soliciting with handbills, *Florida Gulf Coast Bldg. & Constr. Traders Council*, 796 F.2d 1328, 1332 (11th Cir.1986) (distribution of handbills protected by First Amendment), or even flag burning, *Monroe v. State Court of Fulton County*, 739 F.2d 568, 572 (11th Cir.1984) (burning American flag is a form of protected speech).

In this case, the right of Defendant to speak his native tongue, Spanish, is implicated.[5] For example, in *Yniguez v. Mofford*, 730 F.Supp. 309 (D.Ariz. 1990), the federal district court unequivocally held that a "state constitutional prohibition on use of any language other than English by all officers and employees of all political subdivisions in state while performing their official duties, with limited exceptions, was facially invalid as overbroad in that it gave rise to substantial potential for inhibiting constitutionally protected free speech rights."[6] The *Yniguez* court reasoned that:

> Under the provisions of § 3(2)(c), for example, a governmental entity within Arizona "may act in a language other than English" to teach a student a foreign language as part of an educational curriculum. While the teaching of a foreign language by a public school teacher comes within the definition of performing government business, it does not come within the definition of performing a sovereign act. The Attorney General's restrictive interpretation of Article XXVIII is in effect a "remarkable job of plastic surgery upon the face of the ordinance," Shuttlesworth

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[5] The United States Constitution protects not only speech and the written word, but also conduct intended to communicate, *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966), and the federal and state constitutions protect the rights of individuals to associate with whom they please and to assemble with others for political or for ***social purposes.*** *See Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *State v. Dodd*, 561 So.2d 263 (Fla. 1990).

[6] The United States Supreme Court in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997), vacated the decision of the district court on "standing grounds" because the plaintiff state employee had resigned her position prior to the court granting certiorari.

> v. City of Birmingham, 394 U.S. 147, 153, 89 S.Ct. 935, 940, 22 L.Ed.2d 162 (1969), and one which this court cannot accept.

730 F.Supp. at 315. Indeed, in this case, there are too many doubts about what a driver may or may not do (or speak) in order to violate the Statute.

In *Wyche v. State*, 619 So.2d 231, 234 (Fla. 1993), the Florida supreme court held that a city ordinance making it unlawful to loiter in a manner and under circumstances manifesting purpose of engaging in acts of prostitution was unconstitutional. The court held that a law (as written or as applied) which prohibits a person from engaging in conversation with passers-by (or even repeatedly stopping persons or attempting to stop motor vehicle operators by hailing, waving of arms, or any bodily gesture) are "time-honored pastimes in our society and are clearly protected under Florida as well as federal law." *Wyche, supra* at 234, citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). The court commented that all Florida citizens enjoy the inherent right to window shop, saunter down a sidewalk, and wave to friends and passersby with no fear of arrest, and therefore the Tampa Statute was void because it *could* deter the exercise of First Amendment rights. *Id; see also State v. Keaton*, 371 So.2d 86 (Fla. 1979) (penal statute prohibiting certain telephone communications might reasonably be taken as criminalizing the telling of "off-colored" jokes or sexually oriented remarks, in violation of First Amendment freedom of speech). Should it be any different for drivers who wish to speak their native tongue, or even for drivers who do not wish to "sufficiently" learn to read or speak English?

Finally, even the federal government has recognized that the Statute, which is based on a 1936 motor carrier safety law, is outdated and violates due process. The Federal Highway Administration issued its "Advance Notice of Proposed Rulemaking," dated August 26, 1997, which states that it

is considering a revision to the requirement that commercial truck drivers be required to "read and speak the English language sufficiently to converse with the general public . . . " *See Exhibit B.* The federal government acknowledged that the regulation poses many civil rights questions.

IV. The Florida Constitution

The Florida Constitution protects individual rights independent of, and more vigorously than, the United States Constitution. *Traylor v. State*, 596 So.2d 957 (Fla. 1992). Here, with no reasonable basis, Defendant was cited for a violation of the Statute, which is vague and overbroad. For the same reasons enumerated in subsections I through III, *supra.*, and because the Florida supreme court in *Wyche, supra*, has recognized protection for expressive conduct under the Florida constitution, this Court should also declare the Statute void under Article I, Sections 2, 4, 5, and 9 of the Florida Constitution.

WHEREFORE, Defendant respectfully requests that this Court declare the Statute void for vagueness and overbreadth, and also unconstitutional under the free speech/association provisions of the state and federal constitutions, and therefore DISMISS this case.

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WHEREFORE, Defendant respectfully requests that this Court declare the Statute void for vagueness and overbreadth, and also unconstitutional under the free speech/association provisions of the state and federal constitutions, and therefore DISMISS this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished, by hand-delivery and U. S. MAIL, to: Office of the State Attorney, Attn: Ted Booras, Esq., and Division "L", 401 N. Dixie Highway, West Palm Beach, FL 33401, this 25 day of September, 1997.

Respectfully submitted,

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